

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
CIVIL CASE NO. 1:09cv393
[Criminal Case No. 1:07cr54]**

JOSE ANTONIO MOROZUMI, JR.,)	
)	
Petitioner,)	
vs.)	ORDER
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

THIS MATTER is before the Court on the Petitioner's Motion for Court to Take Judicial Notice of Clerk's Failure to Forward Copy of Order Denying Habeas Corpus Thus Denying Him His Right to Appeal [Doc. No. 12].

PROCEDURAL HISTORY

On February 8, 2008, the Petitioner was sentenced to 235 months imprisonment in connection with his conviction for possession with intent to distribute at least 50 grams of methamphetamine, in violation of 21 U.S.C. § 841(a)(1). [Criminal Case No. 1:07cr54, Doc. 26]. On February 17, 2009, the Petitioner's conviction and sentence were affirmed on direct appeal. United States v. Morozumi, 316 Fed. Appx. 285 (4th Cir. 2009). He did not petition for a writ of *certiorari*.

The Petitioner timely filed a motion pursuant to 28 U.S.C. §2255 which

was denied in December 2009. [Doc. 2]. The Court declined to issue a certificate of appealability. [Id.]. Seven months after the civil case had been closed, the Petitioner filed a motion for intervention of right and a writ of habeas corpus. [Docs. 4, 5]. These motions were denied on August 9, 2010. [Doc. 10]. Undeterred, the Petitioner moved for reconsideration of that Order on August 16, 2010. [Doc. No. 11]. That motion was denied on August 19, 2010.

In this motion, the Petitioner advises that he did not receive notice of the Court's ruling on August 9, 2010 which denied his motion for a writ of habeas corpus. [Doc. 12, at 1]. He states that in October 2010, he wrote to the Clerk of Court inquiring about his pending motion and, in response, the Clerk sent him a copy of the docket sheet which showed that his motion was denied on August 9, 2010. [Id., at 1-2]. The Petitioner contends that he never received a copy of the Order denying his motion and therefore did not timely file an appeal from the denial thereof. As a result, he asks that the Court reopen the time within which to appeal.

Rule 4(a)(6) of the Federal Rules of Appellate Procedure provides that a district court may reopen the time within which to file an appeal if the moving party did not receive notice of entry of the order sought to be appealed within twenty-one days after its entry. The record of the case shows that a copy of

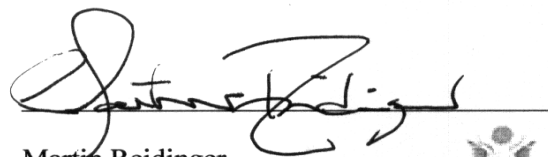
the August 9, 2010 Order was sent to the Petitioner by United States mail on the same date that it was entered. Every document submitted by the Petitioner both before and after that date lists his address as Lexington Federal Medical Center, Post Office Box 14500, Lexington, Kentucky 40512. [Doc. 12, at 5; Doc. 11, at 5; Doc. 9-6]. The record shows that the Order was mailed to the correct address.

In addition, the Petitioner filed a motion to reconsider on August 16, 2010 in which he specifically addressed portions of the Order entered on August 9, 2010. [Doc. 11]. For example, he acknowledged that the Court warned him in the August 9 Order against making frivolous filings and explains why his writ was not frivolous. [Id.]. The Petitioner could not have made arguments specifically attacking portions of the August 9 Order if he had never received it.

The Court therefore finds that the motion should be denied.

IT IS, THEREFORE, ORDERED that the Petitioner's Motion For Court to take Judicial Notice of Clerk's Failure to Forward Copy of Order Denying Habeas Corpus Thus Denying Him His Right to Appeal [Doc. 12] is hereby **DENIED.**

Signed: November 11, 2010


Martin Reidinger
United States District Judge

